Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-310

DENNIS NIX,
Petitioner,

vs.

DONALD SWEENEY, ETC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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DENNIS NIX,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Dennis Nix, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on May 30, 1979.

OPINIONS BELOW

There were no formal opinions of the District Court except for the opinions of the District Court entered on defendant's Motion for Summary Judgment. These opinions are repro-

duced in Appendix D, E and F to this Petition and were not reported. The first opinion of the Court of Appeals is reported in 573 F.2d 998 (8th Cir. 1978). The second opinion of the Court of Appeals is not yet reported. The opinion of the Court of Appeals on the Petition for Rehearing In Banc is unreported. All of these opinions of the Court of Appeals are reproduced in Appendix A, B and C to this Petition.

JURISDICTION

The judgment of the Court below (Appendix B hereto) was entered on May 30, 1979. A timely petition for rehearing in banc was denied on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the District Court during the second trial followed the opinion and mandate of the Court of Appeals in 573 F.2d 998 (8th Cir. 1978) (Appendix A hereto).

2. The effect of any failure by the District Court to follow the opinion and mandate of the Court of Appeals in 573 F.2d 998 (8th Cir. 1978) (Appendix A hereto).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

There are no constitutional, statutory and rules provisions involved in this Petition.

CONCISE STATEMENT OF THE CASE

The petitioner originally filed this suit in the District Court on May 17, 1976 against three individual defendants and the Village of Breckenridge Hills, Missouri. In his Complaint the petitioner alleged that the respondents had unlawfully arrested and confined him and had unlawfully seized and copied his property and thus deprived the petitioner of his rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction of the District Court was based on 42 U.S.C. §§ 1983 and 1985(3), and 28 U.S.C. §§ 1331 and 1343(1), (2) and (3). Before the first trial of the case in the District Court the District Court dismissed the petitioner's Complaint against the Village of Breckenridge Hills, Missouri under the basis of the Missouri doctrine of sovereign immunity (Appendix F hereto). Before the first trial the petitioner dismissed his Complaint against all of the individual defendants except for Donald Sweeney. Before the first trial the District Court entered summary judgment in favor of the respondent Donald Sweeney on the unlawful arrest (Appendix D and E hereto). The case was tried before a jury on the unlawful search and seizure and the District Court entered a judgment in favor of the respondent Donald Sweeney after the jury had returned a verdict against the petitioner. After a Motion for a New Trial and not a partial new trial was filed and denied the petitioner appealed the denial of his Motion for New Trial to the Court of Appeals. On this first appeal the Court of Appeals reversed and remanded the refusal of the District Court to grant a new trial and remanded the cause of action for further proceedings (Appendix A hereto). Also on the first appeal the Court of Appeals affirmed the dismissal of the Village of Breckenridge Hills, Missouri (Appendix A hereto).

Just prior to the selection of the jury for the second trial, the District Court ruled that the issue of the unlawful search

and seizure could not be presented to the jury. Further, the District Court ruled that no evidence could be presented on the unlawful search and seizure unless and until the jury was instructed as to the results of the first jury trial. The jury returned a verdict against the petitioner on the unlawful arrest and the District Court rendered judgment in favor of the respondent. The petitioner's Motion for a New Trial was denied and a second appeal was taken to the Court of Appeals. On May 30, 1979 the Court of Appeals affirmed the judgment of the District Court. On June 8, 1979 a Petition for Rehearing In Banc was filed with the Court of Appeals which petition was denied on June 18, 1979 (Appendix C hereto).

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

First this Court should grant this writ due to the fact that the decision of the Court of Appeals is in direct conflict with the holding of this Court in *Briggs v. Pennsylvania Railroad Company*, 334 U.S. 304 (1948) which held that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court."

Here there is no doubt that the District Court on the second trial did not follow the opinion and mandate of the Court of Appeals in the first appeal. First this is due to the fact that the petitioner in his first Motion for New Trial did not ask for a partial new trial because the District Court erred in granting a partial summary judgment on the unlawful arrest issue but instead asked for a complete new trial. Second, the first appeal was from the refusal of the District Court to grant a complete new trial. Third, is the express language by the Court of Appeals in its first opinion:

> "The District Court granted a motion to dismiss the defendant Village of Breckenridge Hills because of the Missouri doctrine of sovereign immunity. The District Court also granted partial summary judgment for defendant Donald Sweeney, Acting Chief of Police, because of its view that the arrest was made with probable cause. A jury determined the remaining issues against Nix. He appeals from the refusal of the District Court to grant his motion for a new trial. We reverse and remand.
>
> The District Court denied all relief. Nix appeals, primarily complaining of the dismissal of the Village because of the Missouri sovereign immunity doctrine and the granting of summary judgment on the issue of probable cause for the arrest. We consider these points separately.

> Thus, consistent with the Eighth Circuit's position in Giordano, summary judgment pursuant to Fed. R. Civ. P. 56 was precluded and the issue of whether probable cause existed for plaintiff Nix's arrest should have been submitted to the jury.
> Judgment reversed and remanded for further proceedings." (Appendix A hereto).

In *Roth v. Hyer*, 142 F.2d 227, 229 (5th Cir. 1944), the Court stated.

> "Generally when a case is reversed and remanded for further proceedings, it goes back to the trial court and there stands on the issues as if the former trial had not taken place. In the absence of any direction limiting the new trial to particular issues the whole case is tried anew, in pursuance of the principles of law disclosed in the opinion of the appellate court, which must be regarded as the law of the case on the second trial. 3 Am Jur, Appeal and Error, § 1240."

Also in its opinion on the second appeal the Court of Appeals recognized the fact that the District Court did not follow its opinion and mandate due to the fact that the Court of Appeals affirmed the judgment of the District Court solely upon the basis that "while the plaintiff is entitled to have his case decided by a jury, the defendant is also entitled to a conclusion of this litigation" (Appendix B).

During the second trial the District Court did not allow any evidence as to the illegal search and seizure to be presented to the jury so that the jury could find the respondent liable of an illegal search and seizure due to the unlawful arrest. In *Mapp v. Ohio*, 367 U.S. 643 (1961) this Court held that a search and seizure not incident to a lawful arrest was unlawful. Further during the second trial the petitioner by introducing evidence of the search and seizure could have argued that the

arrest was not made with probable cause due to the fact that the reason for the arrest along with the other factors showing no probable cause was for the reason of conducting the search and seizure.

By not allowing evidence as to the search and seizure the District Court clearly did not follow the mandate and opinion of the Court of Appeals in the first appeal and thus the Court of Appeals on the second appeal erred in affirming the judgment of the second trial by not following this Court's decision in *Briggs v. Pennsylvania Railroad Company*, 334 U.S. 304 (1948).

Second this Court should grant this writ due to the fact that the Circuit Court of Appeals have consistently followed the opinion of this Court in *Briggs v. Pennsylvania Railroad Company*. In *Wm. G. Poe & Company v. Armour & Company*, 414 F.2d 862, 865 (5th Cir. 1969) the Court held citing *Briggs* that "upon remand from an appellate court, the lower court i limited to carrying out the directions of the mandate; it 'has no power of authority to deviate from the mandate' . . ." In *Ratay v. Lincoln National Life Insurance Company*, 405 F. 2d 286, 287-288 (3rd Cir. 1968) the Court in citing *Briggs* in a footnote held that a District Court must comply strictly with a mandate directed to it by the reviewing court, and it is only where there is a clear-cut change in state law after the appellate decision, which change clearly compels a different conclusion, that the District Court may disregard a mandate it has received. In *Mefford v. Gardner*, 383 F. 2d 748 (6th Cir. 1967) the Court held that on remand it is the duty of the trial court to execute the mandate of the appellate court precisely according to its terms, without alteration, modification or change in any respect. In *El Paso Natural Gas Company v. Kelly*, 321 F.2d 645 (10th Cir. 1963) the Court held that "upon remand from an appellate court with a specific mandate the trial court

is limited to the imperative of the mandate and is without jurisdiction to vary or extend it." In *Crane Co. v. American Standard, Inc.*, 490 F.2d 332, 341 (2nd Cir. 1973) the Court cited *Briggs* for holding "that a district court must carry out the mandate of a court of appeals, even if the mandate was in error." In *City of Cleveland, Ohio v. Federal Power Commission*, 561 F. 2d 344, 346 (D.C. Cir. 1977) the Court in citing *Briggs* held that "the decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority" and "the latter 'is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case' " . . . In *Firth v. United States*, 554 F.2d 990, 993-994 (9th Cir. 1977) the Court held that "when a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court." In *Independent Nail & Packing Co. v. Perry*, 214 F.2d 670, 673 (7th Cir. 1954) the court held that "where a lower court has failed to comply with a mandate of a reviewing court, compliance with such mandate may be compelled by writ of mandamus."

It should also be pointed out that the decision of the Court of Appeals on the second appeal conflicts with the prior decisions of this Court of Appeals. *Thornton v. Carter*, 109 F.2d 316 (8th Cir. 1940); *Paull v. Archer-Daniels-Midland Company*, 313 F. 2d 612 (8th Cir. 1963); and *Schneider v. Duggan*, 364 F. 2d 316 (8th Cir. 1966).

Third this writ should be granted due to the fact that the issue presented greatly effects the federal court system of justice. This is due to the fact that the Court of Appeals by its opinion on the second appeal is refusing to comply with its own opinion and mandate. All of the other cases cited in this petition except

for *Briggs* are cases in which a court of appeals was enforcing its own mandate and opinion. Further, in *Briggs* the Court of Appeals followed its own mandate and opinion and it was the Petitioner who was attempting to attack the mandate and opinion of the Court of Appeals.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX.

APPENDIX A

United States Court of Appeals
For the Eighth Circuit
No. 77-1340

Dennis Nix, Appellant, v. Donald Sweeney, et al., Appellees.		Appeal from the United States District Court for the Eastern District of Missouri

Submitted: November 17, 1977
Filed: March 31, 1978

Before GIBSON, Chief Judge, HEANEY, Circuit Judge, and HUNTER, District Judge.*

GIBSON, Chief Judge.

Dennis Nix brought this action against the Village of Breckenridge Hills and certain of its officials for damages and injunctive relief arising out of his allegedly illegal arrest and the allegedly unlawful search, seizure, and photocopying of his property. The District Court granted a motion to dismiss the defendant Village of Breckenridge Hills because of the Missouri doctrine of sovereign immunity. The District Court also granted partial summary judgment for defendant Donald Sweeney, act-

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* The Honorable Elmo B. Hunter, United States District Judge, Western District of Missouri, sitting by designation.

ing chief of police, because of its view that the arrest was made with probable cause. A jury determined the remaining issues against Nix. He appeals from the refusal of the District Court to grant his motion for a new trial. We reverse and remand.

On July 5, 1974, a shooting occurred at 9799 B St. Charles Rock Road, Breckenridge Hills, Missouri. Nix resided in the basement of that address. The main floor served as the office of the National Socialist White People's Party, St. Louis Unit, and as a bookstore, the White Power Information Center. Also residing at the address were Allen Balogh and David Farrah.

Witnesses to the shooting reported that Farrah and another individual had used Nix's green 1965 Crevrolet station wagon at the time of the shooting. Farrah and Balogh were arrested as being the two persons involved in the crime. The automobile was subsequently located at a parking lot with spent shell casings inside.

Nix left his place of employment when he learned of the shooting. He went to the Village Hall where he was arrested at 11:00 p.m., at the instance of Donald Sweeney, lieutenant and acting chief in the Police Department of the Village of Breckenridge Hills.

Nix was released at 6:00 a.m. on the following day without formal charges being filed. The complaint alleged in part:

> From the time of Plaintiff's arrest and imprisonment until the time of Plaintiff's release the following morning, Defendants Donald Sweeney, Willard Jacobs and Gerald Sweeney did unlawfully break in and enter upon Plaintiff's said place of business and residence and did take therefrom all of Plaintiff's records, files, documents and other materials of varying natures, some of which were related to Plaintiff's business and personal affairs, and many of

> which were confidential records regarding Plaintiff's political organizing and political associations. The individual Defendants transported all said materials, documents, files and records to the police department of the Defendant Village of Breckenridge Hills, where all documentary materials were photocopied. Multiple copies of each document were made, in order that there would be sufficient copies of each document to convey said copies of each said document to various other law enforcement agencies. Copies of each said document were in fact given, on the orders of Defendants Donald Sweeney and Willard Jacobs, to various other law enforcement agencies. Several other copies of each document were retained by the Police Department of the Defendant Village of Breckenridge Hills.

Nix brought this action asserting the defendants[1] had unlawfully arrested and confined him and had unlawfully seized and copied his property. He claimed these acts deprived him of his rights under the first, fourth, fifth, ninth and fourteenth amendments to the Constitution of the United States. Jurisdiction was based on 42 U.S.C. §§ 1983 and 1985(3), and 28 U.S.C. §§ 1331 and 1343(1), (2), and (3).[2] Nix sought $5,000,000 in actual damages; a like amount in punitive damages; a mandatory injunction requiring the return to him of "all files, papers, documents, materials and copies thereof now in the

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[1] The original complaint named Donald Sweeney, individually and as Chief of Police; Willard Jacobs, individually and as Commissioner of Police; Gerald (Jerome) Sweeney; and the Village of Breckenridge Hills, Missouri, as defendants. After the Village's motion to dismiss was granted, Nix filed an amended complaint against the remaining defendants. For reasons not appearing in the record on appeal, Nix then dismissed defendants Willard Jacobs and Gerald (Jerome) Sweeney.

[2] Diversity jurisdiction was also pleaded under 28 U.S.C. § 1332, stating, "[T]here are issues involving state law which this Court has the jurisdiction to hear * * *." However, the claims asserted are actually for alleged violation of Federal statutes or the Constitution. The plaintiff now resides in Illinois; defendants are Missouri residents.

possession of Defendants"; and other equitable relief. The District Court denied all relief. Nix appeals, primarily complaining of the dismissal of the Village because of the Missouri sovereign immunity doctrine and the granting of summary judgment on the issue of probable cause for the arrest. We consider those points separately.

Summary Judgment on the Arrest

Fed. R. Civ. P. 56 provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." In determining the propriety of such action, the Supreme Court has stated all evidence must be interpreted in the light most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The language of the Supreme Court indicates the Fed. R. Civ. P. 56 summary judgment standard is quite strict. The moving party must be entitled to judgment as a matter of law, and has the burden of establishing the absence of a genuine issue.

The Eighth Circuit has articulated the following guidelines to be used in applying Rule 56: "Summary judgment is an extreme remedy which is not to be granted unless the movant has established his right to judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any possible circumstances." *New England Mutual Life Insurance Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977); *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 207, 209 (8th Cir. 1976); *Percival v. General Motors Corp.*, 539 F.2d 1126, 1128 (8th Cir. 1976). The party must be entitled "to relief 'beyond all doubt' without 'room for controversy.' " *Williams v. Chick*, 373 F.2d 330, 331 (8th Cir. 1967).

In order to prevail on summary judgment in a false arrest case, the evidence, including admitted facts and disputed facts viewed in the light most favorable to the plaintiff, in the knowledge of the police officer ordering the arrest, must conclusively establish probable cause. *See Giordano v. Lee*, 434 F.2d 1227 (8th Cir. 1970), *cert. denied*, 403 U.S. 931 (1971). Conflicting evidence on any issue would make that issue a jury question.

The Supreme Court discussed probable cause for arrest in *Beck v. Ohio*, 379 U.S. 89 (1964). Probable cause exists if

> the facts and circumstances within [the enforcement officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

379 U.S. at 91. Probable cause for arrest, then, includes two aspects: first, that a crime has been committed, and, second, that the accused more probably than not participated in it.

In *Linn v. Garcia*, 531 F.2d 855 (8th Cir. 1976), a civil rights action involving a claim of false arrest, the Eighth Circuit held that each case involving the question of probable cause for arrest must be decided on its own facts. The court further noted: "Where the facts are in dispute or where they are subject to different inferences the question of probable cause is for the jury; however, where the facts are not disputed or are susceptible to only one reasonable inference, the question is one of law for the court." 531 F.2d at 861.

This position had been enunciated several years earlier in *Giordano v. Lee, supra.* Citing cases from the Third, Ninth and Tenth Circuits, the court stated: "Our research also leads us to conclude that in civil rights actions of this nature [false arrest], where a genuine issue of fact on the existence of probable cause for arrest is presented, the question should be submitted

to the jury." 434 F.2d at 1230. The court further clarified the guidelines to be used in determining whether a jury question existed: "Where the supporting evidentiary matter of the moving party reveals 'unexpected gaps' or where the truth is not certain, the movant has not sustained the burden of demonstrating the absence of genuine issue of fact." 434 F.2d at 1231.

In holding the issue of probable cause was a jury question, *Giordano* discussed a reasonableness standard: "We think that the evidence adduced * * * coupled with the inferences therefrom, was such that reasonable minds could differ as to whether or not the officers acted in good faith and with probable cause." 434 F.2d at 1231-32.

In applying the two-pronged *Beck* standard to the current case, it is clear that the officer ordering Nix's arrest knew a crime had been committed. However, it is not clear that the officer was prudent in his belief that Nix had committed it.

According to Donald Sweeney's affidavit, he knew that two shootings had taken place on July 5, 1974. Witnesses stated two men had participated in the first shooting and identified one of those men. Witnesses stated further that a car, known to be owned by the plaintiff, had been seen when the first shooting occurred. Two men were arrested but the car was not found in the area. The car was later located at a parking lot "not at police station" with spent casings inside. The plates on the car in question were issued to Dennis Nix. Dennis Nix was at the police station. Knowing all this information, defendant Donald Sweeney ordered Nix's arrest.

In addition to the above information, consistent with Fed. R. Civ. P. 56, in granting summary judgment in the present case the trial court must have considered the affidavits of Nix himself and of Les McCullum, the officer who arrested Nix. While

Nix's affidavit is of limited value, since the information contained therein would not have been known to Sweeney at the time he ordered the arrest, McCullum's is significant. McCullum's affidavit states one of Sweeney's own officers had told Sweeney that Nix had been at work at the time of the shooting. In addition, Sweeney knew that Nix had gone to the police station. Nix's behavior in voluntarily going to the police station, leaving three times to make phone calls, and returning and remaining in the vicinity for approximately one hour prior to his arrest, can be viewed as inconsistent with participation in the offense charged. Sweeney also knew only two people were present in the car at the time of the shooting and that two people had already been arrested, one of whom had been identified.

In the language of *Giordano*, the above information indicates "the truth is not certain." Since the record in this case established that the evidence, coupled with inferences therefrom, creates a question as to whether or not defendant's acts were warranted, it cannot be said as a matter of law that probable cause existed for the arrest. Thus, consistent with the Eighth Circuit's position in *Giordano*, summary judgment pursuant to Fed. R. Civ. P. 56 was precluded and the issue of whether probable cause existed for plaintiff Nix's arrest should have been submitted to the jury. *Giordano v. Lee*, 434 F.2d 1227 (8th Cir. 1970). *See also, Jaroslawicz v. Seedman*, 528 F.2d 727 (2d Cir. 1975).

Dismissal of the Village

The Supreme Court held that municipalities are immune from suit under 42 U.S.C. § 1983 in *Monroe v. Pape*, 365 U.S. 167 (1961). *See City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977). Thus, the dismissal of the Village of Breckenridge Hills as a defendant in the § 1983 action was proper.

This complaint also alleges jurisdiction under 28 U.S.C. § 1331. An action against a municipality for violation of con-

stitutional rights guaranteed by the fourteenth amendment may be properly brought under 28 U.S.C. § 1331 if the claim involves the deprivation of substantial constitutional rights and the amount in controversy exceeds the requisite $10,000 amount.[3]

The "1983 immunity" requiring defendant to be a person is not present in § 1331. However, the defense of sovereign immunity is not waived by § 1331; under many circumstances it remains to bar recovery from governmental units. *Smith v. Grimm*, 534 F.2d 1346, 1351 n.6 (9th Cir. 1976); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 531-32 (8th Cir. 1967); *Dicke v. Cheyenne-Arapaho Tribes, Inc.*, 304 F.2d 113 (10th Cir. 1962); *Anderson v. United States*, 229 F.2d 675 (5th Cir. 1956).

The above cases involved the immunity of the Federal Government, its agencies, or Indian tribes under its protection. The availability of sovereign immunity as a defense on the part of state and local governments in § 1331 suits has not been fully resolved. In *Panzarella v. Boyle*, 406 F. Supp. 787 (D.R.I. 1975), the court carefully considered this issue. 406 F. Supp. at 797, n.14. It concluded that even if State law of sovereign immunity were recognized, the defendant School Committee enjoyed no State-conferred immunity.

Last year a panel of this court considered this issue in *Owen v. City of Independence*, 560 F.2d 925, 934 (8th Cir. 1977). A divided panel concluded that Federal law governed claims under § 1331 and, "contrary state immunity defenses cannot,

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[3] It is difficult to assess the monetary value of constitutional rights claims. The sum claimed by the plaintiff in good faith at the time of filing must ordinarily be accepted. While plaintiff's claim in this case seems excessive on its face, that fact does not render it insufficient to meet the constantly eroding jurisdictional figure of $10,000. Thus, the claim is sufficient to establish jurisdiction under § 1331.

consistent with the Supremacy Clause, protect the City." The divided panel also held "that the action of the City of Independence deprived Owen of liberty without due process of law * * *." 560 F.2d at 937. That panel of this court was primarily concerned with allegedly false statements by a member of the city council made at a public council meeting. The council resolved that the investigative reports on Owen be referred to the county prosecutor for presentation to the grand jury. 560 F.2d at 936. The *Owen* court was dealing with a situation where the official actions of the city council allegedly harmed the plaintiff. 560 F.2d at 937.

By contrast, the present case involves alleged vicarious liability of the Village under the theory of *respondeat superior*. In keeping with the *Owen* decision, the question we must consider is whether Federal common law under § 1331 should recognize sovereign immunity for municipalities in cases of *respondeat superior* liability. After balancing the uncertain benefits of the *respondeat superior* doctrine against the certain encroachment on limited local government revenues, we conclude that Federal law should incorporate State principles in this area.[4]

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[4] *Owen* recognized that different issues would be involved in suits for monetary judgments based on varcious liability. 560 F.2d at 933, n.9. It suggested that the scope of the Federal remedy might not include vicarious liability. *See Rizzo v. Goode*, 423 U.S. 362, 377 (1976) (recognizing that "important considerations of federalism are additional factors weighing against" granting relief).

Finally, we must consider whether the District Court erred in its determination that the claim alleged by Nix was in fact barred by the Missouri doctrine of sovereign immunity. Nix's only argument to avoid the doctrine is that his claim was for personal injury and property damage and thus within the

exception of Mo. Rev. Stat. § 71.185 (1969),[5] if the Village carried liability insurance. Nix asserts the District Court should have taken as true Nix's averment that the Village had insurance. We will assume that the common-law torts of false arrest and trespass to chattels would involve personal injury and property damage under Mo. Rev. Stat. § 71.185 (1969). However, construing the complaint most favorably to Nix, we are still left with the fact that he seeks damages for violations of Federal statutes and the Constitution, rather than Missouri tort law.[6] Here the exception does not apply and the claim against the municipality is barred. We affirm the dismissal of the Village of Breckenridge Hills.

Judgment reversed and remanded for further proceedings.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[5] Mo. Rev. Stat. § 71.185 (1969), provides in part:

1. Any municipality engaged in the exercise of governmental functions may carry liability insurance and pay the premiums therefor to insure such municipality and their employees against claims or causes of action for property damage or personal injuries, including death, caused while in the exercise of the governmental functions, and shall be liable as in other cases of torts for property damage and personal injuries including death suffered by third persons while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried.

[6] *McArthur v. Pennington*, 253 F. Supp. 420 (E.D. Tenn. 1963), is similar to the present case in that municipal sovereign immunity was alleged to have been waived by the existence of liability insurance. The court there found waiver had occurred to the extent of the policy limits. *McArthur* is distinguishable from the present case because the City's liability in that case was based on State law, an issue not present in Nix's complaint.

APPENDIX B

United States Court of Appeals for the Eighth Circuit

No. 78-1885

Dennis Nix, Appellant,

v.

Donald Sweeney, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: May 15, 1979

Filed: May 30, 1979

Before GIBSON, Chief Judge, HEANEY, Circuit Judge, and MacLAUGHLIN, District Judge.*

GIBSON, Chief Judge.

Plaintiff Dennis Nix appeals from the judgment of the District Court[1] dismissing his cause of action after a jury verdict in favor of the defendants. Nix contends that the District Court did not follow a prior opinion of this court, *Nix v. Sweeney*, 573 F.2d 998 (8th Cir. 1978), which reversed in part an earlier judgment in this case and remanded the matter to the District Court for further proceedings. After carefully considering the parties' briefs and the record, we affirm.

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* The Honorable Harry H. MacLaughlin, United States District Judge, District of Minnesota, sitting by designation.

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

This case involves claims that the defendants violated the constitutional rights of Dennis Nix by arresting him and searching, seizing. and copying his property. The facts are adequately set forth in our earlier opinion. At that time the District Court held Nix's arrest by Sweeney and other police officers was based on probable cause and was lawful. Therefore it granted summary judgment on that issue and submitted only the issues regarding the search and seizure to the jury. The jury found for the defendants. We reversed because conflicting evidence of probable cause for an arrest is a matter for the jury to weigh and not a matter for resolution by summary judgment. *Nix v. Sweeney*, 573 F.2d 998 (8th Cir. 1978); *Linn v. Garcia*, 531 F.2d 855 (8th Cir. 1976); *Giordano v. Lee*, 434 F.2d 1227 (8th Cir. 1970).

On remand, the District Court limited the second jury trial to the issues involving the arrest and excluded or limited evidence concerning the search and seizure. The jury found for the defendants, implicitly concluding that probable cause existed for the arrest.

It is clear that all possibilities for recovery have now been logically foreclosed by the two jury verdicts. The latest jury trial resulted in a finding that the arrest was lawful. The earlier jury trial resulted in a finding that Nix was not entitled to recover after the District Court had ruled that the arrest was lawful. There is no factual issue remaining for decision. While the plaintiff is entitled to have his case decided by a jury, the defendant is also entitled to a conclusion of this litigation.

Judgment affirmed.

A true copy.

Attest: /s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

United States Court of Appeals for the Eighth Circuit

No. 78-1885 September Term, 1978

Dennis Nix, Appellant, vs. Donald Sweeney, etc., Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 18, 1979

APPENDIX D

United States District Court, Eastern District
of Missouri, Eastern Division

Dennis Nix,
Plaintiff,
vs.
Donald Sweeney, et al.,
Defendants.
No. 76-439 C (1)

ORDER

(Filed January 2, 1977)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that defendant's motion for summary judgment be and is granted only with regard to plaintiff's claim against him for illegal arrest.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on the remainder of plaintiff's claims be and is denied.

Dated this 27th day of January, 1977.

/s/ J. H. MEREDITH
United States District Judge

APPENDIX E

United States District Court
Eastern District of Missouri
Eastern Division

Dennis Nix,
Plaintiff,
vs.
Donald Sweeney, et al.,
Defendants.
No. 76-439 C (1)

MEMORANDUM

(Filed January 27, 1977)

This matter is before the Court on defendant's motion for summary judgment. For the reasons stated below, the motion will be granted in part and denied in part.

Plaintiff has brought this civil rights action in an amended complaint against Donald Sweeney, duly appointed and acting Lieutenant and acting Chief of Police of the Village of Breckenridge Hills, Missouri, pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, and 28 U.S.C. § 1343(1), (2), (3). Plaintiff alleges that at about eleven o'clock p.m., on July 5, 1974, he was falsely arrested on the defendant's order without probable cause and without a warrant. He claims that he was held until about six o'clock a.m. the following morning; that during that period he was not taken before a judge, court, or magistrate; that he was not permitted to make bail, post bond, or be released on his own recognizance; and that he was not permitted to contact

his family, friends, attorney, or any other person. The plaintiff contends that at no time was he charged with any crime, but states in his affidavit that he was charged with assault with intent to commit murder. Further, the plaintiff alleges that while he was incarcerated, the defendant, and others, illegally entered upon plaintiff's place of business and residence, took all of plaintiff's records, files, documents, and other materials; transported these materials to the Village of Breckenridge Hills Police Department; made several photocopies of each item; sent copies of the material to various law enforcement agencies; and then returned some of the materials to plaintiff's place of business and residence. Plaintiff contends some of the materials taken were records of the National Socialist White People's Party, St. Louis Unit, a political organization of which plaintiff was a member. Plaintiff claims that the acts of the defendant were done willfully, knowingly, and with the specific intent to deprive plaintiff of his constitutional rights, and that the plaintiff was deprived of his rights guaranteed him by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, and by 18 U.S.C. § 245, 42 U.S.C. § 1983, and 42 U.S.C. § 1985(3).

Defendant has moved for summary judgment, contending that no material issues of fact remain in this matter. The undisputed facts show that on July 5, 1974, plaintiff resided at 9799(b), St. Charles Rock Road; that the basement of plaintiff's residence served as plaintiff's living quarters, and the main floor served as a bookstore and as the office of the National Socialist White Peoples' Party, St. Louis Unit; that Allen Balogh and David Farrah a/k/a David Miller, were also residing at the said address; and that the plaintiff owned a green 1965 Chevrolet Station Wagon. On July 5, 1974, a double shooting took place at said address, Balogh and Farrah were arrested as suspects, and several witnesses reported that said auto had been used by Farrah and another person when the shootings occurred. Defendant knew that the plaintiff owned the auto in question; therefore, when Balogh and Farrah were arrested

and the auto was not found in the immediate area, the defendant suspected that plaintiff was in possession of it. Shortly thereafter, the auto was discovered, and spent casings were found therein. The defendant was aware of all the foregoing; thus, when he was informed by radio that plaintiff was at the Village of Breckenridge Hills Police Department, the defendant ordered that the plaintiff be arrested and charged with assault with intent to commit murder.

It was held in *State v. Robinson*, 484 S.W.2d 186, 189 (Mo. 1972), that probable cause for an arrest without a warrant exists if the arrest:

> ". . . was based upon information possessed by the officers which constituted reasonably trustworthy information of facts and circumstances sufficient to warrant a man of reasonable caution to believe that offenses had been committed and reasonable ground for belief that the person arrested was guilty."

Surely, the facts presented herein would warrant a man of reasonable caution to believe that a shooting had taken place, and that the plaintiff was guilty. Accordingly, as a matter of law, defendant did have probable cause to order plaintiff's arrest. Therefore, the defendant's motion for summary judgment will be granted with regard to plaintiff's claim that he was arrested without probable cause.

Many issues as to material facts are presented with regard to the circumstances surrounding the defendant's allegedly illegal search and seizure. Accordingly, except as otherwise provided herein, defendant's motion for summary judgment will be denied. *Giordano v. Lee*, 434 F.2d 1227 (8th Cir. 1970), cert. denied, 403 U.S. 931 (1971).

Dated this 27th day of January, 1977.

/s/ J. H. MEREDITH
United States District Judge

APPENDIX F

United States District Court, Eastern District
of Missouri, Eastern Division

Dennis Nix,
Plaintiff,

vs.

Donald Sweeney, et al.,
Defendants.

No. 76-439 C (1)

ORDER

(Filed August 19, 1976)

IT IS HEREBY ORDERED that plaintiff's motion for default judgment against defendants Village of Breckenridge Hills and Donald Sweeney be and is denied. F.R.Civ.P. 12(a).

IT IS FURTHER ORDERED that plaintiff's motion to dismiss the motions to dismiss of defendants Village of Breckenridge Hills and Donald Sweeney be and is denied.

IT IS FURTHER ORDERED that the separate motions of defendants Jerome Sweeney, Donald Sweeney, and Willard Jacobs to dismiss for failure to state a claim be and are denied.

IT IS FURTHER ORDERED that the separate motions of defendants Jerome Sweeney, Donald Sweeney, and Willard Jacobs to strike and for a more definite statement be and are granted as follows: The portion of plaintiff's complaint denominated as "Introduction" is stricken. Plaintiff is given leave to

file an amended complaint incorporating a short and plain statement of his allegations against each individual defendant within thirty days from the date of this order. If not so amended, plaintiff's complaint will be dismissed.

IT IS FURTHER ORDERED that the separate motion of defendant Village of Breckenridge Hills to dismiss be and is granted. Plaintiff does not have a claim under 42 U.S.C. §§ 1983 and 1985(3), since the municipal corporation is not a person within the meaning of those statutes. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961). Although a claim can be maintained against a municipal corporation directly under the Fourteenth and other Amendments, with jurisdiction based on 28 U.S.C. §1331, as long as the requisite jurisdictional amount is met, see *Williams v. Brown*, 398 F.Supp. 155 (N.D.Ill. 1975); *Maybanks v. Ingraham*, 378 F.Supp. 913 (E.D.Pa. 1974), plaintiff's claim against the village must be dismissed since under Missouri law, municipal corporations are immune from liability for torts arising out of acts performed by their officers and employees in the exercise of a governmental function. *Varnal v. Kansas City*, 481 S.W.2d 575, 580 (Mo.App. 1972).

Dated this 19th day of August, 1976.

/s/ J. H. MEREDITH
United States District Judge

FILED
SEP 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-310

DENNIS NIX,
Petitioner,

VS.

DONALD SWEENEY, ETC.,
Respondent.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari

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Whether the Mandate of the United States Court of Appeals for the Eighth Circuit remanding this case for new trial required a new trial on all theories of liability originally advanced by Plaintiff-Petitioner, or, whether the Court of Appeals order was limited by the issues raised and preserved on appeal of Petitioner.. 4

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IN THE

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OCTOBER TERM, 1979

No. 79-310

DENNIS NIX,
Petitioner,

vs.

DONALD SWEENEY, ETC.,
Respondent.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari

STATEMENT OF THE CASE

Suit was filed by Petitioner against three individual Defendants, including Respondent, and the Village of Breckenridge Hills. Petitioner alleged a violation of rights guaranteed under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. Petitioner specifically alleged he had been unlawfully arrested by Respondent and that Respondent had unlawfully seized certain records and other documents belonging to Petitioner. Prior to trial, Petitioner dis-

missed his complaint as to all individual defendants except Respondent, and the District Court entered Summary Judgment on behalf of the Village of Breckenridge Hills relying on Missouri's Doctrine of Sovereign Immunity. The District Court also entered Summary Judgment in favor of Respondent on the issue of his alleged unlawful arrest. The case was tried before a jury on the allegation of unlawful search and seizure. The jury returned a verdict for Respondent. Thereafter, Petitioner filed a Motion for a New Trial. Following a denial of that Motion, Petitioner filed an appeal to the United States Court of Appeals for the Eighth Circuit. Petitioner raised several issues in his first Statement of Issues on Appeal. He stipulated that no portions of the transcript would be included in the record. In response to Petitioner's Statement of Issues on Appeal, the Respondent requested several portions of the transcript be included in the record. Petitioner thereafter filed an amended designation which states:

> "Comes now Appellant and amends in full his prior designation filed with the Court:
>
> 1. That no part of the transcript is to be included in the record of appeal and that the record of appeal is to consist solely of a certified copy of the docket entries in this matter subject to the right of any party to request the United States Court of Appeals for the Eighth Circuit that designated parts of the record be transmitted.
>
> Appellant further states that the issues he intends to present on appeal are as follows:
>
> 1. Whether the court properly entered summary judgment in favor of defendant, Donald Sweeney, that his arrest of plaintiff on July 5, 1974, was made with probable cause.
> 2. Whether the court properly ruled that the plaintiff's complaint did not state a cause of action against defendant, the Village of Breckenridge Hills, upon the grounds of sovereign immunity." (Mailed by Mr. Richard Geissal April 5, 1977).

The Court of Appeals then considered the Appeal, affirmed the dismissal of Breckenridge Hills, and reversed the District Court's Order of Summary Judgment on the issue of false arrest and remanded the case back to the District Court.

Judge Meredith limited the retrial to the issue of whether or not Respondent had probable cause to arrest Petitioner. The jury returned a verdict for Respondent on the issue of unlawful arrest and Judgment was entered against Petitioner. Petitioner's Motion for a New Trial was denied, and a second appeal taken. The sole issue raised on the second appeal was whether the District Court properly followed the mandate issued by the Court of Appeals. On May 30, 1979, the Court of Appeals affirmed the judgment of the District Court. On June 18, 1979, the Court of Appeals denied Petitioner's Petition for Rehearing in Banc.

ISSUE

1. Whether the mandate of the United States Court of Appeals for the Eighth Circuit remanding this case for new trial required a new trial on all theories of liability originally advanced by Plaintiff-Petitioner, or, whether the Court of Appeals Opinion was limited to those issues raised and preserved on appeal by Petitioner.

ARGUMENT

I

A careful reading of the Petition for a Writ of Certiorari in this case reveals only one real issue presented for this Court's consideration—whether the District Court on remand followed the mandate of the Eighth Circuit Court of Appeals. Rule 19, Supreme Court Rules, can be fairly summarized as requiring Petitioner to raise some substantial issue of law; either a conflict between courts on a question of law, or a decision of first impression by a lower court on an important issue of federal law. In essence, Petitioner complains only of the Court of Appeals' failure to enforce Petitioner's interpretation of the court's own mandate. Presumably the Court would not have affirmed the District Court on appeal had they agreed with Petitioner.

In order to determine exactly what the Court of Appeals wished presented to a jury on remand it is necessary to consider which issues were preserved by Petitioner on appeal. Petitioner's initial intent apparently was to raise numerous issues on appeal. However, following Respondent's designation of portions of the transcript he wished to place before the Court of Appeals, Petitioner amended his designation and abandoned all issues except whether the court properly entered Summary Judgment on the allegations of false arrest. The only issues discussed by the Court of Appeals were those briefed by Petitioner. The failure of Petitioner to set out additional points on appeal constitutes an abandonment of those issues. ***Pet Milk Co. v. Boland,*** 185 F. 2d 298 (8th Cir. 1950). The relief sought by Petitioner makes no mention of a retrial on the issue of the illegality of the search and seizure of his documents. This conclusion states:

> "Clearly there is a material issue of fact as to whether appellee, Donald Sweeney, did have probable cause for the arrest of appellant and, therefore, the ruling of the trial court should be reversed and the cause of action for wrongful arrest should be presented to a jury. Further, since a cause of action has been stated against appellee, the Village of Breckenridge Hills, the ruling of the trial court should be reversed and remanded."

Petitioner cannot abandon an issue on appeal, fail to brief the issue, and, indeed, completely ignore the issue on appeal, and then complain when the order of the appellate court fails to address that issue. Rule 28(a)(5), Rules of Appellate Procedure, provides the conclusion of Appellant's Brief shall be: "A short conclusion stating the precise relief sought." The relief sought by Petitioner was considered, and the Court of Appeals' decision and Order must be read in light of the request for relief presented.

Petitioner's argument that the trial court must follow the Appellate Court's mandate, while correct, avoids the issue. The Appellate Court did not direct the District Court to retry both the issue of unlawful arrest and the issue of illegal search and seizure. Petitioner's numerous citations supporting his position do not meet the issue. While it is true that the trial court is bound by the mandate of the Appellate Court, the Appellate Court has the option of ordering retrial of less than all the issues originally litigated. Rule 59 (a) Federal Rules of Civil Procedure, provides for new trial as to "all or any of the parties on all or part of the issues." See also ***Gasoline Products Co., Inc. v. Champlin Refining Co.,*** 283 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188 (1933).

The entire thrust of Petitioner's argument is that the Eighth Circuit Court of Appeals' mandate was not followed. The best authority on this issue is the Court of Appeals itself. Petitioner raised this issue on a second appeal, and the very court which issued the mandate affirmed the District Court. Petitioner sets

out only a part of the concluding paragraph of their decision. The paragraph in its entirety states:

> "It is clear that all possibilities for recovery have now been logically foreclosed by the two jury verdicts. The latest jury trial resulted in a finding that the arrest was lawful. The earlier jury trial resulted in a finding that the arrest was lawful. The earlier jury trial resulted in a finding that Nix was not entitled to recover after the District Court had ruled that the arrest was lawful. There is no factual issue remaining for decision. While the plaintiff is entitled to have his case decided by a jury, the defendant is also entitled to a conclusion of this litigation." (A-12)

Thus the very court issuing the mandate determined the District Court acted properly.

Respondent suggests to this court that the Writ of Certiorari should also be denied because Petitioner has had a jury trial on both the issue of the legality of his arrest and the legality of the search of his offices and the seizure of Petitioner's papers. Petitioner alleges he was injured because the court refused to "allow any evidence as to the illegal search and seizure to be presented to the jury so that the jury could find the respondent liable of an illegal search and seizure due to the unlawful arrest."

There was no illegal search and seizure. This issue was tried before a jury in Petitioner's first trial and a verdict for respondent returned. It is conceded that an otherwise proper search and seizure incident to an unlawful arrest is deemed a violation of rights guaranteed under the Constitution of the United States. The second trial was conducted on the issue of the legality of the arrest and the jury again upheld respondent. There was no illegal arrest. There was no unlawful search and seizure independent of the arrest, and, because the jury found

respondent had probable cause to arrest petitioner, there is no possibility that a jury could find, as petitioner implies, that the search and seizure was unlawful because it was conducted following an illegal arrest. The Court of Appeals in its second opinion notes that: "There is no factual issue remaining for decision." (A-12)

In conclusion, the only possible harm to Petitioner arising out of this litigation was the necessity of litigating the issues in two separate trials. As discussed above, due to the relationship between the arrest and the seizure of the documents, there was no harm done to Petitioner by requiring him to try his case before two juries.

CONCLUSION

For the reasons stated, Respondents respectfully request this Court refuse to issue a Writ of Certiorari.

Respectfully submitted,

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